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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHESAPEAKE BAY FISHING COMPANY, L.C.,

Petitioner,

v.

GOLDEN NUGGET, INCORPORATED; DAVID HICKMAN; INDIAN HARBOR INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

John E. Holloway
Counsel of Record
Carl D. Gray
HUNTON & WILLIAMS LLP
500 East Main Street, Suite 1000
Norfolk, Virginia 23510
(757) 640-5300

QUESTION PRESENTED

Whether a general statement of the subject area or issue upon which expert testimony will be given at trial satisfies the requirement found in Federal Rule of Civil Procedure 26(a)(2)(B) that expert opinions and the basis and reasons therefor be disclosed in a detailed written report.

LIST OF ALL PARTIES

All parties to the proceeding below are identified in the caption of this case.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of the petitioner, Chesapeake Bay Fishing Company, L.C. (hereinafter, Chesapeake Bay) is American Proteins, Inc. No publicly held corporation owns 10 percent or more of the stock of Chesapeake Bay.

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6 *Moore's Federal Practice*, § 26.23[2][b][ii] (Matthew Bender 3d ed.) 16, 18

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LOWER COURT CASE CITATIONS

The citation of the opinion of the United States Court of Appeals for the Fourth Circuit is as follows: *Golden Nugget, Inc. v. Chesapeake Bay Fishing Co., L.C.*, 93 Fed. Appx. 530, 2004 WL 691429 (4th Cir. Apr. 2, 2004). The opinion was not selected for publication by the Court of Appeals. A copy of the opinion appears at Appendix 1.

The United States District Court for the Eastern District of Virginia entered an Order on March 10, 2003, denying Chesapeake Bay's motion for judgment as a matter of law or alternatively for a new trial. This Order is not published. A copy appears at Appendix 24.

The United States District Court for the Eastern District of Virginia entered a Final Judgment Order on January 13, 2003, following the jury trial in this civil

action. This Final Judgment Order is not published. A copy appears at Appendix 26.

The United States District Court for the Eastern District of Virginia entered an Order on January 8, 2003, limiting the use of certain expert testimony at trial. This Order is not published. A copy appears at Appendix 28.

STATEMENT OF JURISDICTION

The petitioner, Chesapeake Bay, seeks review of an opinion issued on April 2, 2004, by the United States Court of Appeals for the Fourth Circuit. Chesapeake Bay timely filed with the Court of Appeals a Petition for Rehearing *En Banc*. The Court of Appeals issued an Order denying the Petition for Rehearing *En Banc* on July 28, 2004. *See* App. 22. This Court has jurisdiction to issue a writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN CASE

Federal Rule of Civil Procedure 26(a)(2):

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

> (C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

STATEMENT OF THE CASE

The central issue at the trial of this diversity action was what caused a fire onboard a fishing vessel at Chesapeake Bay's boatyard. On appeal, the central issue is whether the written disclosure of only a general topic area of expert testimony on the cause of the fire satisfies the disclosure requirements found in Federal Rule of Civil Procedure 26(a)(2)(B).

The United States District Court for the Eastern District of Virginia assumed diversity jurisdiction over this civil action pursuant to 28 U.S.C. § 1332.

The United States Court of Appeals for the Fourth Circuit had jurisdiction to hear the appeal of the district court's final judgment pursuant to 28 U.S.C. § 1291.

A. Background Facts.

The F/V GOLDEN NUGGET is a fishing vessel owned by Golden Nugget, Inc., captained by David Hickman, and insured by Indian Harbor Insurance Company (hereinafter collectively, GNI). In October 2000, Golden Nugget, Inc. entered into a contract with Chesapeake Bay to have the vessel undergo routine repair and maintenance at Chesapeake Bay's boatyard.

After its arrival at the boatyard, Chesapeake Bay placed the F/V GOLDEN NUGGET on a marine railway and removed her from the water. Once on land, an employee of

Chesapeake Bay attempted to provide a shore power hookup to the vessel by plugging its shore power cable into a receptacle at the shipyard. When the employee plugged-in the cable, the circuit breaker tripped in the shore power facility and on the vessel. After unsuccessfully attempting to provide shore power by resetting the breakers, the employee cut one of the four wires comprising the shore power cable. When he plugged-in the cable after cutting one of the wires, the breaker did not trip. Once power was connected, Captain Hickman closed the vessel cabin and departed.

Five days later, shipyard employees began welding work on the outside stern area of the vessel. Later that day, a shipyard employee noticed smoke coming from the cabin of the vessel, and a fire was discovered. After the fire was extinguished, investigators found a burned appliance on a lower bunk in one of the bunk rooms of the vessel. The

parties agreed that the appliance was a fan, that the fan was the source of the fire, and that the fan's switch was in the "on" position when the fire started.

B. GNI's Expert Disclosure.

During discovery, GNI served a written report of expert testimony that it planned to introduce at trial from Fredrick West. West's expert report stated his opinions in the following manner:

> In my opinion, the shore power was improperly connected with no neutral or return path. Therefore voltage was circulating through the ships [sic] hull with a floating return path, making it unstable for 3 days until a welder hooked up a grounding conductor which provided a stable return path for flow. The change in ARC's by the welder provided voltage spikes throughout ships [sic] electrical circuits and approximately 1 hour later the fire was found.
>
> Prior to the Golden Nugget entering the shipyard they had been on ships [sic] generator and had no problems. The only change was at the feed disconnect switch (from generator to shore power). We had

> already determined shore power had no return path [sic] neutral.
>
> The spike that caused the heater/appliance to create a spark was a high voltage spike. Therefore the wire to the unit was not melted internally (most wire insulation is rated at 600VAC). The culprit was voltage not current. Melting occurs from excessive current. Dielectric breakdown or internal explosions of equipment cause tracking through components (TV, electronics, control devices, appliances) and is caused by excessive voltage. Current causes breakers to trip, excessive voltage just burns equipment out due to dielectric breakdown.

App. 36. This opinion made clear West's opinion that the fire was caused by voltage spiking from welding work performed on the fifth day at the shipyard.

C. Expert Testimony at Trial.

At trial, Chesapeake Bay was prepared to rebut West's disclosed opinion that voltage from a welder caused the fan to catch on fire. But at trial, West did not render this disclosed opinion. Rather, West testified that the cause of the fire was the burn-up of the fan from voltage spiking

caused by the initial power hook-up. On direct examination, GNI's attorney asked West if he had "a professional opinion as to when in the time line that fan had its motor burn up?" App. 43. West answered: "On initial hook up of the shore power" on the first day. App. 44. GNI's attorney then asked West if he could "tell the jury why it is that if the [fan motor] burned up when the shore power was initially hooked up, the fire didn't occur until five days later?" App. 44. West responded:

> Because when they initially had it operating improperly when they initially did the connection, the wrong connection, the high voltage, they burned up the fan. They opened it up. So the captain wasn't going to see anything running, because the fan wasn't working, because it was open. But when they hooked up the ground to it and they started arcing on it, they gave potential there, difference of potential for the fan to start receiving a signal and heating up again.

App. 44-45.

West's surprise testimony raised the question whether the initial hook-up of power damaged the fan. Chesapeake Bay was not prepared to address this critical question — and had not tested the proposition — because the opinion had not been disclosed in West's expert report. Throughout the testimony, Chesapeake Bay's attorney objected to West's undisclosed expert opinions. App. 44-45. Despite having previously entered an order limiting West's testimony to the opinions disclosed in his report, App. 28, the trial court overruled each objection and allowed the testimony into evidence.

In a bifurcated trial, the jury found Chesapeake Bay liable for negligence, breach of implied warranty of workmanlike performance, and breach of a bailment contract. The trial court entered a final judgment against Chesapeake Bay in the amount of $425,558. App. 4.

D. Decision on Appeal.

On appeal, Chesapeake Bay argued that West's report improperly failed to disclose his opinion that the initial power hook-up caused voltage spiking that damaged the fan's motor. The majority of the three-judge panel concluded that the disclosure provided by West met the Fourth Circuit's standard for disclosure of expert testimony because it notified Chesapeake Bay that "voltage spiking would be an issue at trial, although it could have been more clearly delineated." App. 11. The majority concluded that "while GNI's theory of causation could have been articulated more definitely, it was generally disclosed in West's Expert Report." App. 13. The majority did *not* determine that GNI's failure to clearly disclose West's opinion was harmless under Federal Rule of Civil Procedure 37(c). Rather, the majority accepted the

disclosure as satisfying the requirements of Rule 26(a)(2)(B).

Senior Circuit Judge Hamilton dissented from the majority's opinion. Judge Hamilton recognized that West gave critical opinion testimony at trial that was not disclosed in his report. On this issue, Judge Hamilton wrote:

> No one disputes that West's report identified voltage spiking as a critical part of his theory of causation. Significantly, however, the report, when read in a straightforward manner, opines that the fan was ignited by a voltage spike caused by a "change in ARC's by the welder." . . . The critical point the majority fails to address is whether West's expert report disclosed his opinion, admitted as evidence at trial, that the initial hook up of shore power and the ship's exposure to the high leg instantly caused damage to the fan's motor through voltage spikes, such that the subsequent voltage spikes from the welding work were able to cause the fan to ignite.
>
> The answer to this question is clearly no.

App. 19-20. Judge Hamilton concluded that the majority opinion "significantly weakens, if not obliterates, our civil discovery process," and he concluded that Chesapeake Bay "did not receive anything close to a fair trial." App. 20.

The Fourth Circuit Court of Appeals denied Chesapeake Bay's Petition for Rehearing *En Banc* on July 28, 2004. Judges Luttig and Shedd voted to rehear the case *en banc*. App. 22.

ARGUMENT

The Fourth Circuit's Interpretation of the Disclosure Requirements of Rule 26(a)(2)(B) Conflicts with Decisions of Other Courts of Appeal.

Although Judge Hamilton, in dissent, observed accurately that West's trial opinion had not been disclosed and the majority conceded that the disclosure was at best unclear, the majority held that the disclosure met the requirements of Rule 26(a)(2)(B). The majority reasoned that West's expert report sufficiently notified Chesapeake

Bay that West's trial testimony would have something to do with voltage spiking — which in the Fourth Circuit was all that Rule 26(a)(2)(B) required. The majority rejected Chesapeake Bay's argument that Rule 26(a)(2)(B) required disclosure of a report that identified in detail the complete opinion to be rendered at trial. The Fourth Circuit's interpretation of Rule 26(a)(2)(B) conflicts with the interpretation of Rule 26(a)(2)(B) adopted by the Fifth, Seventh, and Eighth Circuits. *See Salgado v. General Motors Corp.*, 150 F.3d 735, 738, 741 n.6 (7th Cir. 1998) (affirming district court's exclusion of testimony where expert provided report "devoid of any factual basis for its conclusory opinions"); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 571 (5th Cir.), *cert. denied*, 519 U.S. 811 (1996) (affirming district court's exclusion of testimony where one report consisted of an "outline listing [the expert's] 'points of testimony,'"

another report consisted of "two one-paragraph descriptions" of the expert's opinions, and another "only declared what subjects [the expert] intended to research and to discuss at trial"); *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir.), *cert. denied*, 516 U.S. 822 (1995) (affirming district court's exclusion of expert testimony based on "'sketchy and vague' nature" of report).

"Rule 26(a)(2) explicitly requires an expert witness to provide a report containing his opinions as well as the basis and reasons for those opinions." *Walsh v. McCain Foods Ltd.*, 81 F.3d 722, 727 (7th Cir. 1996); *see also* Fed. R. Civ. P. 26(a)(2)(B) (requiring a "complete statement of all opinions to be expressed and the basis and reasons therefor"). "The comments of the Advisory Committee make clear that the expert's reports are to be a detailed and complete statement of the testimony of the expert on direct

examination. It is expected that the reports be far more complete and detailed than the practice in responding to interrogatories under former Rule 26(b)(4)(i)." *Salgado*, 150 F.3d at 741 n.6.; *see also* Fed. R. Civ. P. 26 advisory committee's note, 1993 amendments (emphasizing that the "report . . . is intended to set forth the substance of the direct examination"); 6 *Moore's Federal Practice*, § 26.23[2][b][ii] (Matthew Bender 3d ed.) (stating that "[a]lthough the courts are still struggling with the specificity mandated by the rule, the reported opinions demonstrate that the courts are determined to give effect to the advisory committee's admonishment that the report be 'detailed and complete'"); Steven Baicker-McKee *et al.*, *Federal Civil Rules Handbook* 572 (2004) (stating that the "report itself should contain all the required information with considerable detail"); Robert Matthew Lovein, Note, *A Practitioner's Guide: Federal Rule of Civil Procedure*

26(a) — Automatic Disclosure, 47 Syracuse L. Rev. 225, 258 (1996) (stating that "[a]ll information required" in Rule 26(a)(2)(B) "must be complete and described with detail").

The issue presented in this case is present in most federal court cases. It cannot be disputed that "[t]he use of 'expert' testimony in both civil and criminal cases has increased substantially" over the past decade. Hon. Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 540 (1994). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, this Court stated that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence" offered at trial by an expert. 509 U.S. 595, 579 (1993). Vigorous cross-examination and presentation of

contrary evidence cannot occur without a full and complete pretrial disclosure of an expert's opinion. As recognized in the advisory committee's note to Rule 26, a "detailed and complete written report" is necessary to give the opposing party "a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." Fed. R. Civ. P. 26 advisory committee's note, 1993 amendments. Without a detailed and complete recitation of the expert's opinion, the opposing party fails to receive a fair trial in federal district court. See 6 *Moore's Federal Practice*, § 26.23[2][b][ii] (Matthew Bender 3d ed.) (stating requirement that "the disclosures be sufficiently detailed so as to avoid unfair surprise to the opposing party").

In the United States Court of Appeals for the Fourth Circuit, however, an expert report need only disclose the issue or topic area of an opinion that will be introduced at

trial. Other Courts of Appeal interpret Rule 26(a)(2)(B) to require a detailed disclosure of the expert's actual trial opinion. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), this Court clarified the standard for admissibility for expert witness testimony at trial. The Court should grant *certiorari* in this case to clarify the standard for disclosure of expert opinions under Rule 26(a)(2)(B). Alternatively, the Court should summarily reverse the Fourth Circuit's new "topic area" standard of expert disclosure.

Respectfully submitted,

John E. Holloway
Counsel of Record
Carl D. Gray
Hunton & Williams LLP
500 East Main Street, Suite 1000
Norfolk, Virginia 23510
(757) 640-5300

October 25, 2004

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

GOLDEN NUGGET, INCORPORATED; David Hickman; Indian Harbor Insurance Company,

Plaintiffs-Appellees,

v.

CHESAPEAKE BAY FISHING COMPANY, L.C.,
Defendant-Appellant.

No. 03-1339

Argued Dec. 4, 2003

Decided April 2, 2004

Before WILKINSON and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished opinion. Judge DUNCAN wrote the opinion, in which Judge WILKINSON joined. Senior Judge HAMILTON wrote a dissenting opinion.

COUNSEL

ARGUED: John Early Holloway, Hunton & Williams, L.L.P., Norfolk, Virginia, for Appellant. Megan Elizabeth Burns, Williams Mullen, Newport News, Virginia, for Appellees. **ON BRIEF:** Benita W. Ellen, Hunton & Williams, L.L.P., Norfolk, Virginia, for Appellant. Christopher A. Abel, Williams Mullen, Newport News, Virginia; Frank L. Corrado, Jr., Stephen Barry, Rossi, Barry, Corrado, Grassi & Gibson, P.C., Wildwood, New Jersey, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

DUNCAN, Circuit Judge.

Following trial, the jury found Appellant Chesapeake Bay Fishing Company, L.L.C. ("Chesapeake Bay") liable for damages to the GOLDEN NUGGET, a fishing vessel owned by Appellee Golden Nugget, Inc., captained by Appellee David Hickman, and insured by Appellee Indian Harbor Insurance Company (collectively, "GNI"). Chesapeake Bay challenges the district court's decision permitting GNI to introduce expert opinions that Chesapeake Bay contends were not previously disclosed to it and the denial of its motion for judgment as a matter of law or a new trial. Because we conclude that the evidentiary error was harmless and that the district court properly denied Chesapeake Bay's motion for judgment as a matter of law or a new trial, we affirm.

I.

In October 2000, GNI entered into a contract with Ampro Shipyard, owned by Chesapeake Bay, for routine repair and maintenance on the F/V GOLDEN NUGGET. On October 20, 2000, the GOLDEN NUGGET was placed on a marine railway and removed from the water. In preparation for the repair work, an employee of Chesapeake Bay attempted to provide a shore power hookup to the vessel by plugging its shore power cable into a receptacle at the shipyard. When the cable was plugged in, the circuit breaker in the shore power facility tripped, as did the circuit breaker on the GOLDEN NUGGET. The shipyard employee reset the breakers and attempted to plug the shore power cable in again; the shore power circuit breaker tripped again. The shore power cable had four wires, colored white, red, black, and green, and on the third attempt an employee managed to provide shore power to the vessel by cutting the white wire. This time the breaker did not trip. Once power was connected, Captain Hickman closed the vessel cabin and departed.

Five days later, shipyard employees began welding work on the outside stern area of the GOLDEN NUGGET. Later that day, a yard employee noticed smoke coming from the cabin of the vessel, and a fire was discovered.

After the fire was extinguished, investigators found a burned appliance on a lower bunk in one of the bunk rooms. The parties later agreed that the appliance was a fan, that the fan was the source of the fire, and that the fan's switch was in the "on" position when the fire started.

At trial, Chesapeake Bay contended that the fan had been left on and unattended while surrounded by

flammable paper products. Chesapeake Bay theorized that the fan's blades were blocked and could not turn, and the eventual heat build-up of the fan caused the paper products to ignite. GNI argued that a voltage spike caused by the initial failed shore power hookup damaged the fan. Under GNI's theory of causation, the later voltage spiking related to the welding caused the damaged fan to spark and ignite the fire.

In a bifurcated trial, the jury found Chesapeake Bay liable for negligence, breach of implied warranty of workmanlike performance, and breach of a bailment contract. The court entered a final judgment against Chesapeake Bay in the amount of $425,558.

During trial, Chesapeake Bay raised two objections to the admission of testimony by Frederick West, GNI's expert witness, that form the basis of this appeal. First, Chesapeake Bay objected to the admission of West's expert opinion that voltage spiking caused the fire. Chesapeake Bay argued that the opinion was not disclosed in West's Expert Report as required by Fed.R.Civ. P. 26.[1] Second, Chesapeake Bay objected to the admission of West's testimony regarding the existence of a thermal cutout on the fan that sparked the fire. A thermal cutout causes an appliance to turn off in the presence of heat or excessive current, but is not affected by excessive voltage.

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[1] *See* Fed.R.Civ.P. 26(a)(2)(B) (requiring disclosure of a written report prepared and signed by an expert witness, which "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor....").

Confirmation of a cutout therefore undercut Chesapeake Bay's theory of causation. The district court overruled both objections.

After the entry of judgment, Chesapeake Bay made a timely motion for judgment as a matter of law or alternatively for a new trial, again arguing that West's causation opinion was improperly admitted. The district court denied this motion, finding that West's expert testimony tracked information properly disclosed in his Expert Report. Additionally, the district court found that even if the testimony varied slightly from the disclosed information, that variation was harmless. The district court further ruled that West's testimony about the thermal cutout was elicited during GNI's rebuttal case, and that the use of the undisclosed opinion on rebuttal did not violate Rule 26.

II.

A district court's evidentiary rulings, including rulings on the admissibility of expert testimony, are reviewed for an abuse of discretion. *See Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 141-42, (1997). An abuse of discretion occurs when a district court makes an error of law. *See United States v. Barile*, 286 F.3d 749, 753 (4th Cir. 2002).

A.

We turn first to the more troubling issue of the admission of testimony about the existence of a thermal cutout. GNI stipulates that West examined the physical remains of the fan the day before the trial and formed the opinion at that time that evidence of such a thermal cutout existed. GNI did not disclose this new opinion to Chesapeake Bay.

Fed.R.Civ.P. 26(e)(1) imposes a duty on parties to supplement disclosures if the information disclosed is later found to be incomplete or incorrect. Further, Rule 26 requires disclosure of *all* expert opinion testimony. *See* Fed.R.Civ.P. 26(a)(2)(B) ("The report shall contain a complete statement of *all* opinions to be expressed and the basis and reasons therefor ...." (emphasis added)).

There is no basis in the Rule for distinguishing disclosures of testimony to be used on direct examination or in rebuttal. The district court erred in holding that the disclosure of expert testimony is not required when it is offered in rebuttal. We turn, then, to a consideration of whether the error is harmless.[2]

We base an analysis of harmless error on the five factors in *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.,* 318 F.3d 592, 597 (4th Cir. 2003), considering: (1) the level of surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Chesapeake Bay argues that it was taken by surprise when GNI offered West's opinion about the existence of a thermal cutout. Based on a review of the discovery in this case, while we do not doubt that Chesapeake Bay was

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[2]Fed.R.Civ.P. 37(c)(1) provides that information not disclosed pursuant to Rule 26 may not be used as evidence at trial "unless such failure is harmless...."

surprised by West's testimony regarding physical evidence of the existence of a cutout, it was on notice that the existence of a thermal cutout was a continuing issue for GNI. During his deposition taken two weeks before trial, William Harris, Chesapeake Bay's electrical expert, was asked by GNI's counsel whether it was possible that the fan had a thermal cutout. Additionally, during the deposition of joint forensic expert Dr. Richard Martin, he opined that "[t]his device did not have a thermal cutout" and that "[g]enerally [a thermal cutout] will survive a fire." *See* Martin Dep. at 134-35. In fact, the entire Martin deposition, taken just a week before trial, centered around verifying that the appliance was a fan, and whether there was evidence of a thermal cutout. Perhaps most telling, during the deposition of West taken two weeks before trial, counsel for Chesapeake Bay questioned him extensively about the existence of a thermal cutout. West testified that "every fan I've looked at has a thermal cutout in it." When asked why Dr. Martin found no thermal cutout, West responded, "They didn't look good enough [sic] or it's burned out...." West Dep. at 61. Thus, although Chesapeake Bay was surprised when West testified that he found evidence of a thermal cutout, it was clearly on notice of his position that one existed.

With respect to the second factor, Chesapeake Bay argues that it lacked the ability to cure the surprise because it had "no rebuttal or response." Br. at 16. To the contrary, we find Chesapeake Bay had not only the ability to cure any surprise, but also the opportunity. Chesapeake Bay had expert testimony available to it opining that there was no physical evidence of a thermal cutout. At trial, GNI introduced a deposition summary of the findings of joint forensic expert Martin, who analyzed the remains of the

fan.[3] The summary included the fact that Dr. Martin "did not find any signs of a thermal cutout, but acknowledged that does not mean that the fan did not have a thermal cutout." Since Dr. Martin was a joint expert, Chesapeake Bay also had access to his opinion that "[t]his device did not have a thermal cutout" and that "[g]enerally [a thermal cutout] will survive a fire." Martin Dep. at 134-35. Chesapeake Bay made no effort to have this testimony admitted. At the conclusion of the deposition summary presented by GNI, the district court specifically asked Chesapeake Bay if it had any cross summary. J.A. 264. Chesapeake Bay declined the opportunity.

The conclusion that Chesapeake Bay had the ability to cure the surprise but failed to capitalize on opportunities to do so is reinforced by three other instances during trial. Chesapeake Bay's electrical expert, Harris, had testified during trial that "[t]here is nothing that indicates that [the fan] ever had a thermal cutout." J.A. 324. Nevertheless, when GNI recalled West to testify about the existence of the thermal cutout in rebuttal, Chesapeake Bay declined the opportunity to cross-examine West. Further, after GNI rested its case, the court asked Chesapeake Bay, "Any surrebuttal?" J.A. 340. Chesapeake Bay also declined this opportunity. Finally, immediately after this, the court released the jury for the day but kept the attorneys in order to hear motions regarding jury instructions. Chesapeake Bay did not ask to be heard on the issue of surprise, and at

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[3]Although Dr. Martin did not testify at trial, GNI offered a deposition summary of his testimony.

no time asked for a continuance or extended recess in order to afford it the opportunity to cure the surprise.

As to the third factor, the district court's willingness to hear further evidence from Chesapeake Bay is indicative that curative testimony would not have disrupted the trial. To the contrary, the district court, acting *sua sponte,* offered Chesapeake Bay the opportunity to introduce a cross summary of Dr. Martin's deposition, and offered Chesapeake Bay the opportunity for surrebuttal following West's testimony.

With respect to the fourth factor, the existence of a thermal cutout in the fan was important to Chesapeake Bay's theory of causation for the reasons described above. The existence of a cutout weakened its claim that heat build up caused the fire.

Finally, we find the excuse offered by GNI for its failure to disclose to be supported by the facts in this case. GNI contends that it believed the fan remains were of no further importance after its first examination, and "simply neglected to retrieve the fan from Martin until the week before trial." Br. at 16. This explanation is supported by the transcript of the Martin deposition, taken one week before trial. Counsel for GNI told Dr. Martin, "I'm going to give you an address and ask you to Fed-Ex [the fan remains] down to me so that we can have it for use at trial next week." Martin Dep. at 16.

Confirmation of the existence of a thermal cutout surprised Chesapeake Bay at trial, a result Rule 26 is designed to avoid. Although we do not find that GNI acted in bad faith, that does not excuse its failure to notify Chesapeake Bay immediately upon its discovery of what it

believed to be the remains of the thermal cutout. Further, our consideration of the fourth factor weighs in favor of Chesapeake Bay's claim; the evidence in question was certainly important to its theory of causation.

On the other hand, Chesapeake Bay was aware of Mr. West's contention that such a cutout existed, and the fan was in the possession of Dr. Martin until the week before trial. More significantly, however, Chesapeake Bay failed to avail itself of any of the opportunities that existed to cure the effect of the surprise. The district court offered Chesapeake Bay an opportunity for surrebuttal. Chesapeake Bay declined, even though its own expert was available to testify to the contrary. Dr. Martin, who had the fan in his possession until the week before trial, opined that such a cutout did not exist, and his deposition containing that testimony had been entered into evidence. Chesapeake Bay did not request a recess or a continuance to seek his testimony. It made no attempt to mitigate the effect of the surprise. Weighing these factors, we conclude that admitting the undisclosed expert testimony concerning the evidence of a thermal cutout on the fan constituted harmless error.

B.

Chesapeake Bay's second issue on appeal is whether the district court erred when it allowed West to testify that excessive voltage caused the fire. Chesapeake Bay alleges that this theory of causation was not disclosed in West's Expert Report and must therefore be excluded pursuant to Rules 26(a)(2)(B) and 37(c)(1).

On October 25, 2002, GNI delivered West's Expert Report to Chesapeake Bay. This Report consisted of (1) his

Investigative Report, (2) standard shipyard regulations and information, (3) National Electrical Code Requirements for Commercial Wiring, and (4) a letter from West to GNI's counsel, responding to the report of Chesapeake Bay's electrical expert Harris. On January 3, 2003, Chesapeake Bay filed a motion *in limine,* seeking to exclude West's opinions because Chesapeake Bay contended that West was unqualified as an expert, and that he failed to disclose his opinions in his Expert Report. The district court granted in part and denied in part this motion. The court held that West's expert testimony would be limited to what was disclosed in his Expert Report, but Chesapeake Bay's motion to exclude West's testimony was denied as untimely.

Chesapeake Bay contends that GNI originally attributed the fire solely to a voltage spike created by the absence of a ground in connection with the welding work. Therefore, Chesapeake Bay argues, the theory that voltage spiking, unrelated to the existence or absence of a ground during the welding work, caused the fan to burn up and ignite the fire was undisclosed and therefore inadmissible.

We agree with the district court's finding that West's report did provide notice that voltage spiking would be an issue at trial, although it could have been more clearly delineated.[4] For instance, in his Report, West stated,

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[4] Additionally, in a letter to Chesapeake Bay dated September 21, 2001, GNI summarized its initial position: "The cumulative effect of these inexcusable errors on Ampro's part were that the GOLDEN NUGGET experienced a series of high voltage spikes (as indicated by an internally blown light ballast on board), particularly once Ampro

(continued...)

"[T]he ballast did receive a voltage spike ... [the blown ballast] was not the starting point of the fire but was a good indication of voltage spiking." He wrote that "voltage was circulating through the ships [sic] hull with a floating return path, making it unstable.... The change in ARC's by the welder provided voltage spikes throughout ships [sic] electrical circuits and approximately 1 hour later the fire was found." He further stated, "The spike that caused the heater/appliance to create a spark was a high voltage spike.... The culprit was voltage not current.... Current causes breakers to trip, excessive voltage just burns equipment out due to dielectric breakdown." In West's letter in response to Harris' Report, which was included in West's Expert Report, he stated, "I disagree with the findings and feel [voltage spiking] is possible cause of damage [sic]." West further stated, "[That a voltage spike should not have any effect on equipment downstream] is unknown," and"[e]very ballast I looked at was blown which tells me that excessive voltage was cause [sic] of any electrical/electronics equipment defects." In response to Harris' contention that excessive current caused the fan to ignite, West stated, "If rotor was stopped [sic], excessive *current* would be drawn. Breakers would have tripped. The external wires to this appliance showed no signs of wire melting inside out. But we know we had excessive voltage by testimony and evidence of blown ballast." J.A. 650-78.

We agree with the district court's conclusion that

---

began welding on the vessel, that led directly to the fire that gutted her." J.A. 545.

while GNI's theory of causation could have been articulated more definitively, it was generally disclosed in West's Expert Report. Thus, the district court did not abuse its discretion in allowing the testimony.

C.

Our conclusion as to the admissibility of GNI's causation testimony controls our analysis of Chesapeake Bay's contention that it was entitled to a directed verdict or a new trial. Because we find West's opinion to be admissible, we conclude that there was sufficient evidence for the jury to find Chesapeake Bay liable. Further, the district court did not abuse its discretion in denying the motion for a new trial in the interest of justice. *See Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996). ("[I]t is the duty of the [district court] to set aside the verdict and grant a new trial, if ... [1] the verdict is against the clear weight of the evidence, or [2] is based on evidence which is false, or [3] will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.").

III.

For the foregoing reasons, the judgment in the district court in *Golden Nugget, Inc. v. Chesapeake Bay Fishing Company, L.C.*, No. 03-1339, is

AFFIRMED.

HAMILTON, Senior Circuit Judge, dissenting:

Because Chesapeake Bay did not receive anything close to a fair trial in this case, I respectfully dissent. I agree with the majority that the district court erred in

holding that West's expert rebuttal testimony, to the effect that he found physical evidence of a thermal cut-out on the remains of the fan, was excepted from the dictates of Federal Rule of Civil Procedure (Rule) 26(a)(2)(B) and (e)(1). However, I disagree with the majority's holding that the admission of such testimony constituted harmless error, and thus, was not subject to exclusion pursuant to Rule 37(c)(1). I also disagree with the majority's holding that GNI's two-step theory of causation, presented at trial, was sufficiently disclosed in West's expert report, such that the district court did not abuse its discretion in allowing West to testify to the theory at trial. For these reasons, I would vacate the judgment and remand for a new trial with the condition that, prior to trial, Chesapeake Bay be allowed to conduct further discovery regarding the evidence challenged in this appeal, in accordance with Rule 26.

I.

As part of its rebuttal case, GNI recalled West to give expert opinion testimony on the question of whether the physical remains of the fan contained evidence of a thermal cut-out. In relevant part, the transcript reveals the following exchange between counsel for GNI and West during West's direct testimony in rebuttal:

> BY MR. ABEL:
>
> Q Sir, you have had occasion to take a close look at the remains of the fan that is exhibit 63, right?
>
> A Yes, sir.
>
> Q Sir, is there anything there that leads you to believe that there was a thermal cut-out on that fan?

A Yes, sir.

Q Can you tell us what that is?

* * *

[A] Crimp right here on this wire. That is consistent with how a thermal protector would be installed.

* * *

Q Is there anything else on there on any other wire also consistent with having been a thermal cut-out ought [sic] there?

* * *

[A] You can see where a switch was installed. This is a switch. There is some other wires somewhere. But this part of it is one side of a thermal cut-off.

* * *

Q Have you seen that sort of thing before?

A Yes, sir.

(J.A. 338-40).

Because expert testimony has the potential to "be both powerful and quite misleading," *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 595, (1993) (internal quotation marks omitted), basic due process demands that expert testimony be subject to "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Id.* at 596 (internal quotation marks omitted). Because GNI violated Rule 26(a)(2)(B) and (e)(1), Chesapeake Bay was prevented

from subjecting the above quoted expert testimony to vigorous cross examination and prevented from presenting contrary evidence at trial.

With all due respect, the majority's assertions to the contrary do not withstand scrutiny. What the majority characterizes as Chesapeake Bay's declined opportunities to cure the effect of its surprise amount to nothing. Such alleged declined opportunities include: (1) Chesapeake Bay's opportunity to submit Dr. Richard Martin's (Dr. Martin) deposition testimony that his pretrial examination of the fan debris did not reveal a thermal cut-out or any other switching elements or something as a separate thermal cut-out; (2) Chesapeake Bay's opportunity to recall its own expert William Harris (Harris) in surrebuttal to reiterate his previous testimony that there is nothing in the fan remains to indicate that the fan ever had a thermal cut-out; and (3) Chesapeake Bay's opportunity to *sua sponte* request a continuance or extended recess in order to afford it the opportunity to cure its surprise through further discovery.

With respect to the first two of these three alleged declined opportunities, the testimony of Dr. Martin and Harris is far too general to rebut West's detailed and specific trial testimony, while apparently holding the burnt fan in his hands, that what led him to believe the fan had a thermal cut-out was the "crimp right here on this wire. That is consistent with how a thermal protector would be installed." (J.A. 339). Moreover, without being armed with an expert witness opinion to rebut West's very specific and detailed testimony regarding the physical evidence of a thermal cut-out, Chesapeake Bay lacked the ability to effectively cross examine West on this point. Indeed, " 'the

ability to simply cross-examine an expert concerning a new opinion at trial is not the ability to cure, ... [as] the rules of expert disclosure are designed to allow an opponent to examine an expert opinion for flaws and to develop counter-testimony through that party's own experts.'" *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 598 (4th Cir. 2003).

Moreover, to put the burden on Chesapeake Bay, at the very end of a jury trial, to *sua sponte* request a continuance or extended recess in order to conduct further discovery and develop a credible response to expert testimony submitted in blatant violation of Rule 26(a)(2)(B) is unjustifiable. By placing such a burden on Chesapeake Bay, the majority sends the clear message that compliance with Rule 26(a)(2)(B) and (e)(1) is merely discretionary; indeed, only a nice idea, with no real consequences from noncompliance.

Considering (1) Chesapeake Bay's lack of ability and opportunity to cure the prejudice of surprise that even the majority acknowledges Chesapeake Bay suffered when West testified during rebuttal regarding the physical evidence of the existence of a thermal cut-out on the fan, (2) the undisputed importance of such testimony in that it completely undercut Chesapeake Bay's sole theory of causation, and (3) the pitiful excuse offered by GNI for failing to comply with Rule 26(a)(2)(B) and (e)(1), the conclusion is inescapable that the district court abused its discretion in overruling Chesapeake Bay's objection to West's rebuttal testimony regarding physical evidence of a thermal cut-out on the fan. Accordingly, at a minimum, I would vacate the judgment and remand for a new trial, with the condition that, Chesapeake Bay be allowed to conduct

further discovery on the matter prior to such new trial.

II.

On appeal, Chesapeake Bay also challenges the district court's admission of West's direct testimony setting forth his two-step theory of causation. On direct examination, West was asked if he had a professional opinion as to when, in the time line, the fan had its motor burn up? West answered: "On initial hook up of the shore power." (J.A. 282). West was then asked, if he could "tell the jury why it is that if the motor fan burned up when the shore power was initially hooked up, the fire didn't occur until five days later?" *Id.* West responded:

> Because when they initially had it operating improperly when they initially did the connection, the wrong connection, the high voltage, they burned up the fan. They opened it up. So the captain wasn't going to see anything running, because the fan wasn't working, because it was open. But when they hooked up the ground to it and they started arcing on it, they gave potential there, difference of potential for the fan to start receiving a signal and heating up again.

(J.A. 282-83). In his next answer, West explained that the arcing resulted from voltage spikes caused by the welding work on the ship.

Chesapeake Bay argued below, and continues to argue on appeal, that West's two-step theory of causation (*i.e.*, (step one) initial burnup of the fan's motor, which made possible (step two) the subsequent fire originating from the fan five days later following an hour after the

welding work) should have been excluded pursuant to Rule 37(c)(1) and the district court's January 8, 2003 order granting Chesapeake Bay's motion *in limine* to the extent that such motion sought to limit West's expert testimony at trial "to what was disclosed in his expert report of October 25, 2002...." (J.A. 54). According to Chesapeake Bay, West's two-step theory of causation was not set forth in his expert report of October 25, 2002. Chesapeake asserts that West's report can only reasonably be read to opine that the fan caught fire solely because a "change in ARC's by the welder" created voltage spikes in the fan. (J.A. 651).

The majority glosses over the crux of Chesapeake Bay's argument by merely concluding that it agrees "with the district court's finding that West's report did provide notice that voltage spiking would be an issue at trial, although it could have been more clearly delineated." *Ante* at 535-36. Notice that voltage spiking would be an issue at trial is hardly the point. No one disputes that West's report identified voltage spiking as a critical part of his theory of causation. Significantly, however, the report, when read in a straightforward manner, opines that the fan was ignited by a voltage spike caused by a "change in ARC's by the welder." (J.A. 651) ("The change in ARC's by the welder provided voltage spikes throughout [the] ship[']s electrical circuits and approximately 1 hour later the fire was found."). The critical point the majority fails to address is whether West's expert report disclosed his opinion, admitted as evidence at trial, that the initial hook up of shore power and the ship's exposure to the high leg instantly caused damage to the fan's motor through voltage spikes, such that the subsequent voltage spikes from the welding work were able to cause the fan to ignite.

The answer to this question is clearly no. Indeed, when West was asked during his deposition, taken just two weeks before trial, whether, anywhere in his report, he "explicitly sa[id]" that he thought "the coils of the fan were burned out by a voltage spike when the high leg was hooked up ... ?", West answered, "Nowhere in this report, no." (J.A. 615). West admitted during cross examination at trial that this was indeed his deposition testimony. (J.A. 294). In a case where the expert witness himself admits that his own report does not explicitly express a critical part of the very causation theory that he espouses at trial, that Chesapeake Bay cannot reasonably be expected to have leapt such an informational chasm is axiomatic. Accordingly, I would hold that the district court erred in overruling Chesapeake Bay's timely objection to the admission of West's two-step theory of causation during his direct testimony, and would remand for a new trial with the condition that Chesapeake Bay, at a minimum, be allowed to conduct further discovery on the matter prior to such new trial.

III.

In conclusion, I am constrained to express that the majority's affirmance in this case not only creates unfair consequences for Chesapeake Bay, it significantly weakens, if not obliterates, our civil discovery process and the intended bite of Rule 37(c)(1)'s exclusionary rule. GNI blatantly did not play by the discovery rules with regard to the expert testimony of West, and yet, suffered no adverse consequences. Indeed, GNI was able to use the effects of its own discovery violations to its very own significant tactical advantage. This court should not be in the business of readily countenancing such behavior. Accordingly, with

the conditions which I have already set forth, I would vacate the judgment and remand for a new trial.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

July 28, 2004

No. 03-1339

CA-02-537

GOLDEN NUGGET, INCORPORATED; DAVID HICKMAN; INDIAN HARBOR INSURANCE COMPANY

Plaintiffs – Appellees

v.

CHESAPEAKE BAY FISHING COMPANY, L.C.

Defendant – Appellant

On Petition for Rehearing En Banc

Appellant filed a petition for rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Judges Luttig and Shedd voted to rehear the case en banc, and Chief Judge Wilkins, Judges Widener,

Wilkinson, Niemeyer, Williams, Michael, Motz, Traxler, King, Gregory, and Duncan voted against rehearing en banc.

The Court denies the petition for rehearing en banc.

Entered at the direction of Judge Duncan for the Court.

For the Court,

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GOLDEN NUGGET, INC., et al.,	
Plaintiffs,	
v.	Civil Action Number 3:02CV537
CHESAPEAKE BAY FISHING CO., LLC,	
Defendant.	

ORDER

This matter is before the Court on the defendant's motion for judgment as a matter of law or alternatively for a new trial.

The defendant argues that the testimony of the plaintiffs' expert witness, Fred West, exceeded the scope of what was disclosed in his expert report, that it therefore violated this Court's Order of January 8, 2003, and that the plaintiffs violated the Federal Rules of Civil Procedure in failing to disclose in advance all opinions and theories that their expert presented and relied upon at trial. The defendant argues that the testimony of Fred West must be excluded pursuant to Federal Rule of Civil Procedure 37(c). The Court disagrees with the defendant and adheres to the ruling made during trial that the testimony of West

basically tracked what was previously disclosed in his expert report and what he testified to during his deposition, and that even if there were slight variations, any such variation was harmless. Based on the facts of this case, including the extensive discovery that occurred and the extended time that elapsed between the actual fire and the trial, the Court finds that the defendant had adequate time to investigate the opinions of the plaintiffs' expert and that the defendant should not have been caught by surprise by his testimony. Additionally, the defendant had its own expert present at trial to counter any testimony of West, and the "thermal cut-out" testimony to which the defendant objects was elicited only during the plaintiffs' rebuttal case. Because the Court finds that the testimony of the plaintiffs' expert tracked what was disclosed prior to trial, the Court finds no violation of the Rules and the defendant's motion for judgment as a matter of law or alternatively for a new trial is DENIED.

The defendant is DIRECTED that if it chooses to appeal, it shall post a bond in the amount of $475,558. This amount includes the total amount of the judgments against the defendant and an additional $50,000 to account for interest that may accrue. The Clerk is DIRECTED to process the plaintiff Indian Harbor Insurance Company's bill of costs and the objections thereto in the usual manner.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Mar. 10, 2003
DATE

/s/ Richard L. Williams
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

GOLDEN NUGGET, INC., DAVID HICKMAN, INDIAN HARBOR INSURANCE COMPANY,	
Plaintiffs,	
v.	Civil Action Number 3:02CV537
CHESAPEAKE BAY FISHING CO., LLC,	
Defendant.	

FINAL JUDGMENT ORDER

This matter is before the Court for a jury trial. Based on the jury's verdict on liability and the stipulation of the parties as to plaintiff Indian Harbor Insurance Company's damages, the Court GRANTS plaintiff Indian Harbor Insurance Company's Motion for Judgment as a Matter of Law and judgment is hereby entered in favor of plaintiff Indian Harbor Insurance Company and against defendant Chesapeake Bay Fishing Company, L.L.C., in the amount of $320,000. Based on the jury's verdict on liability and damages, judgment is hereby entered in favor of plaintiff Golden Nugget, Inc., and against defendant Chesapeake Bay Fishing Company, L.L.C., in the amount

of $70,802. Based on the jury's verdict on liability and damages, judgment is hereby entered in favor of plaintiff David Hickman and against defendant Chesapeake Bay Fishing Company, L.L.C., in the amount of $34,756.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

1-13-03	/s/ Richard L. Williams
DATE	SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GOLDEN NUGGET, INC., et al.,	
Plaintiffs,	
v.	Civil Action Number 3:02CV537
CHESAPEAKE BAY FISHING CO., LLC,	
Defendant.	

ORDER

This matter is before the Court on several pretrial motions. For reasons stated in a conference call on January 8, 2003, the Court makes the following rulings. The defendant's motion in limine is GRANTED IN PART AND DENIED IN PART. The expert testimony of Mr. West will be limited to what was disclosed in his expert report of October 25, 2002, but the defendant's motion to exclude the testimony of Mr. West and/or for the Court to conduct a Daubert hearing as to his qualifications as an expert is denied as untimely. The plaintiff's motion in limine regarding Mr. Mullis' expert testimony is TAKEN UNDER ADVISEMENT. The Court DIRECTS that the trial of this matter will be bifurcated. Trial of the liability issue will occur first, and trial of the damages issue will occur only if necessary after the jury reaches a verdict on

liability. Finally, the Court DIRECTS the parties to amend the style of the case to name plaintiff's insurance carrier as a party in interest.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Jan. 8, 2003 /s/ Richard L. Williams

DATE SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GOLDEN NUGGET, INC.,
A New Jersey Corporation,

and

DAVID HICKMAN,

Plaintiffs,

v.

Civil Action No.
3:02cv537

CHESAPEAKE BAY FISHING
CO., L.C.,

Defendant.

RULE 26(a)(2)(B) EXPERT REPORT OF FRED WEST

Plaintiffs Golden Nuggett, Inc. ("GNI") and David Hickman (hereinafter, "Hickman"), by counsel, pursuant to Rules 26(a)(2)(B) of the Federal Rules of Civil Procedure ("Federal Rules"), provide the following expert report of previously identified Master Electrician Fred West ("West").

1. Opinion and Basis Therefor

West's expert report is attached hereto as Exhibit 1.

2. Exhibits

West's Exhibits are attached as Appendices 1 and 2 to his expert report.

3. Qualifications

A. West's qualifications are attached hereto as Exhibit 2.

B. In the last ten years, West has authored no publications.

4. Compensation

West will be paid $95.00/hr for his work in this matter.

5. Prior Expert Testimony

West has never testified as an expert at trial or by deposition in the past four years.

/s/ Christopher A. Abel

Christopher A. Abel (VSB #31821)
James J. Reid (VSB #45796)
WILLIAMS MULLEN
Harbor Bank Center, Suite 210
One Old Oyster Point Road
Newport News, VA 23602-7119
Tel: (757) 249-7117
Fax: (757) 249-5109

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Rule 26(a)(2)(B) Expert Report of Fred West was hand-delivered, this 25th day of October, 2002, to the offices of the following counsel of record:

John E. Holloway, Esquire
HUNTON & WILLIAMS
SunTrust Center, Suite 1000
500 E. Main Street
Norfolk, VA 23514

/s/ Christopher A. Abel

GOLDEN NUGGET

Investigative Report on

"Golden Nugget"

Performed on October 10, 2000

by Frederick West

Marine and Master Electrician

Appendix #1 Sheet 1 through 10 – Standard shipyard regulations and information

Appendix #2 Sheet 1 through 8 – National Electrical Code Requirements for Commercial Wiring.

List of information and discrepancies noted.

On October 30, 2000 I was tasked to investigate the cause of an electrical fire on board the Golden Nugget vessel located at Ampro shipyard.

Upon my arrival to the shipyard Mr. Michael Gardner, Mr. Tate Austin, myself and shipyard representatives (Alyn Fife and William Harris) first looked at a box which had been removed from the berthing area of the Golden Nugget. The box had 2 light fixtures and was initially thought to be the cause of the fire. We then proceeded to the shore power service feeds receptacle. While viewing the area I observed the following discrepancies:

1. The ships shore power service connector plug was cut off due to dissimilar connectors. Mr. Tate Austin (surveyor) informed me the shipyard had cut it off (The shipyard had no disconnect sheet for proper reconnection).

2. The black and red wires were connected to the "A" and "C" phase respectively. The green wire was connected to the neutral bus (note: Should be white to neutral bus per NEC).

3. No ground fault was installed on circuit.

4. The shipyard had a Delta transformer high leg "B" phase which the shipyard employee initially connected (per information from Mr. Austin). Mr. Tate Austin also told me the shipyard employee that hooked up shore power attempted 2 times to rewire feed circuit without success (breaker kept tripping). On the 3rd attempt the breaker did not trip and the shipyard employee did not check and test circuit for proper connection. The ship Master stated his computer was on, which was found to be protected by a surge protector. (At this time if the heater was turned to the on position the fire would have started then.

5. No connection for bonding of ships hull to shore power grounding electrode. (Normal procedure is ground ships hull to earth).

We then proceeded to the area of the ship where the fire damage was. We all inspected the area and determined the fire started approximately mid way in the bottom bunk where lights were removed next to the galley. The entire local area was fire and smoked damaged, then we proceeded up to the bridge area. I removed a cover on the florescent fixture in adjacent space (galley) to look at a ballast and determined the ballast did receive a voltage spike. It was internally blown out and fluid was oozing at the seams. This was not the starting point of the fire but was a good indication of voltage spiking.

We then went into the engine room and looked at shore power disconnect switch and associated service panel. The following hook up was observed.

[Diagram from original report omitted.]

In effect there was no return path for power flow. Ground was being provided through ships hull at time of inspection (1000 ohms to peer ground).

We left the ship and looked at the removed fixtures again. Upon inspection of the fixtures, both had receptacle plugs made into them for small appliance connections, melted prongs were observed in both fixtures. We returned to the ship and found a second heater (or appliance) in the exact area of where we determined the fire had started. We jointly agreed the heater was the ignition point of the fire.

Conclusion:

In my opinion, the shore power was improperly connected with no neutral or return path. Therefore voltage was circulating through ships hull with a floating return path, making it unstable for 3 days until a welder hooked up a grounding conductor which provided a stable return path for flow. The change in ARC's by the welder provided voltage spikes throughout ships electrical circuits and approximately 1 hour later the fire was found.

Prior to the Golden Nugget entering the shipyard they had been on ships generator and had no problems. The only change was at the feed disconnect switch (from generator to shore power). We had already determined shore power had no return path neutral.

The spike that caused the heater/appliance to create a spark was a high voltage spike. Therefore the wire to the unit was not melted internally (most wire insulation is rated at 600VAC). The culprit was voltage not current. Melting occurs from excessive current. Dielectric breakdown or internal explosions of equipment cause tracking through components (TV, electronics, control devices, appliances) and is caused by excess voltage. Current causes breakers to trip, excessive voltage just burns equipment out due to dielectric breakdown.

Examples:

Lightening striking your house can cause your TV, computer, etc. to burn up, but your wiring typically remains undamaged.

Fluke meter test leads. Read 0 to 999 volts with the same leads and never burn up. You just change the internal dielectric configuration.

I have been a Marine Electrician for 20+ years and am a Master Electrician as well (proof of overall experience upon request). As a marine electrician standard practices per OSHA, EPISM, COAST GUARD regulations and NAV sea regulations. We are required to follow all safety precautions and proper qualifications as a business standard. See APPENDIX #1 pg 1 through 10. I also feel the shipyard acted in violation of the National Electrical Code for standard temporary feeds for commercial power sources. See APPENDIX #2 pg 1-8.

Sincerely

/s/ Fred E. West 11/5/00

[Trial Transcript of January 9, 2003]

of the disclosed opinions.

THE COURT: All right.

But let's get right to his opinion.

BY MR. ABEL:

Q Yes, sir.

Could excessive voltage cause light ballasts to burn out?

A Yes.

Q And again --

MR. HOLLOWAY: Same objection.

THE COURT: Get right to the point that we have here, counsel. I gave you guidance on what he is permitted to say. And why you are avoiding it, I will never know.

MR. ABEL: I didn't know I was.

THE COURT: All right.

BY MR. ABEL:

Q Mr. West, did you have occasion to conduct an investigation aboard the Golden Nuggett for the purposes of determining what caused the fire?

A Yes.

Q Okay.

And as part of that investigation did you have a chance to look at the fan that has been marked plaintiffs exhibit 63, which was in that

picture on the lower bunk in the forward bunk room?

A Yes, sir.

Q And as part of your investigation, could you just briefly walk through the steps that you took for the jury as to how you went about determining what might have caused the fire?

A Okay.

First of all, when we got there I was, we looked at the panel, which we have already discussed. And we know it was hooked up wrong. So we went down to the area.

Q When you say "we," who is "we," sir?

A Tate Austin, Mr. Fife, I think Mike Gardener was with us, and I. Went down to --

Q Was Mr. Harris with you?

A Mr. Harris was with us, also.

Q Go ahead.

A Basically, after finding all this that we have already talked about, the miswiring and all that, we went down to the appliance to determine if we could find out what the problem was. We all agreed it wasn't the fan. I am trying to isolate this down.

Q Yes, sir.

A I started looking at the insulation on the wire to see if it was a current or voltage problem
Q What did you determine?
A I determined that it was a voltage problem. If it was a current problem, the 600-volt wire would have melted. Being it was a voltage problem, it did not melt the coating on the wire going to the fan. I started pealing it back. It had not burned from the inside out, it burned from the outside in.
Q Yes, sir. And then in terms of having decided it was a voltage problem, were you able to further determine what had happened because of the voltage problem? When you say voltage problem, describe for the jury what you mean by that.
A Basically we know that the high leg was sent through the ship.
HOLLOWAY: Objection, Your Honor. Beyond the scope of disclosed opinion.
MR. ABEL: I believe it is right in line.
THE WITNESS: I think it is. Objection is overruled.
BY MR. ABEL:
Q Go ahead.
A I know the high voltage was sent through

110-volt circuit, which initially burned the fan up.

MR. HOLLOWAY: Objection.

THE COURT: The Objection is overruled. Proceed. This is consistent with his --

THE WITNESS: We know that the fan was burned up because we know the other things that happened on the ship, light ballast had blown, so we know we got a circuit through the ship. We knew that the meters were pegging. We knew that the ballasts were blown because I looked at two. I took the covers off, which was plastic. They weren't melted. So I know that it wasn't a fire that caused the ballast to burn out. I know that was an internal explosion.

Q Where were they located?

A Right off the galley, right off the area where the berthing was.

Q Not in the engine room?

A No. In the fire area. But the covers were still on, so I know it didn't melt from the outside. Ballasts you could tell were blown. They have little seams going down the side, and they explode. And if it's broken up, tar starts to flow out and there is a distinct smell on a

burned ballast.
Q Based on that, you determined that it was a voltage problem that had caused this?
A Yes.
Q What was the role of the faulty electric shore tie connection in that, in your opinion, professional opinion, in that voltage problem that caused the fan to catch on fire?
A Because the white lead should have been neutral, which should have gone to the hull of the ship, but they were sending the high leg through the white lead, which made it 240 volts going to the appliances.
Q Appliance like this fan. Is that a 2 --
MR. HOLLOWAY: Same objection, Your Honor.
THE COURT: But you didn't finish the question. You said an appliance like the fan. What were you going to say?
Q I was going to say, appliance like the fan, would that have been a 220-volt appliance?
A No, sir.
THE COURT: It is 110, isn't it?
THE WITNESS: It's 110.
THE COURT: All right. Fine
BY MR. ABEL:

Q And what would be the effect of running 220 volts through a 110-volt appliance like this fan?

A Well, I tried it at home just for my own --

THE COURT: He didn't say what you did at home. He said --

THE WITNESS: Yes.

THE COURT: 220 on 110 burns it out, doesn't it?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. ABEL:

Q All right.

And you indicated that you knew that the fan --

THE COURT: Now, if he indicated it, he already testified to it, so don't repeat it. Because the jury heard it.

BY MR. ABEL:

Q You sat hear and heard the testimony today, right?

A Yes, sir.

Q And do you have a professional opinion as to when in the time line that fan had its motor burn up?

A On initial hook up of the shore power.
MR. HOLLOWAY: Objection. Opinion not disclosed.
THE COURT: All right.
Objection is overruled.
THE WITNESS: Initial hook up of the shore power.
BY MR. ABEL:
Q Can you tell the jury why it is that if the motor fan burned up when the shore power was initially hooked up, the fire didn't occur until five days later?
A Because when they --
MR. HOLLOWAY: Same objection.
MR. ABEL: Again, it is in the report, Judge.
THE COURT: All right.
THE WITNESS: Because when they initially had it operating improperly when they initially did the connection, the wrong connection, the high voltage, they burned up the fan. They opened it up. So the captain wasn't going to see anything running, because the fan wasn't working, because it was open. But when they hooked up the ground to it and they started arcing on it, they gave potential there, difference of potential for the

fan to start receiving a signal and heating up again.

BY MR. ABEL:

Q When you say they hooked up the fan, I am sorry, hooked up the arc to it, is that the welding?

A The welding machine, I mean, yes.

Q In your opinion had the welding machine been hooked up at some earlier point, maybe two or three days prior, was it just as likely that the fire would have occurred at that point?

A No, because you had no return path.

MR. HOLLOWAY: Objection.

MR. ABEL: I would ask Mr. Barry if he has any.

MR. BARRY: No, Your Honor.

MR. ABEL: Please answer any questions Mr. Holloway may have.

THE WITNESS: All right. Fine.

CROSS EXAMINATION

BY MR. HOLLOWAY:

Q Mr. West, as I understood it, understand, you were employed by the insurance company to give testimony in this case; is that correct?

A Yes.

No. 04-573

Supreme Court, U.S.
NOV 29 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHESAPEAKE BAY FISHING COMPANY, L.C.,

Petitioner,

v.

GOLDEN NUGGET, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

FRANK L. CORRADO, JR.
STEPHEN BARRY
ROSSI, BARRY, CORRADO, GRASSI & GIBSON, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333

Attorneys for Respondents Golden Nugget, Incorporated and David Hickman

SAMUEL W. HIXON, III
Counsel of Record
MEGAN E. BURNS
WILLIAMS MULLEN
A Professional Corporation
222 Central Park Avenue
Suite 1700
Virginia Beach, VA 23462
(757) 499-8800

CHRISTOPHER A. ABEL
TROUTMAN SANDERS, LLP
150 West Main Street
Suite 1600
Norfolk, VA 23510
(757) 640-0004

Attorneys for Respondent Indian Harbor Insurance Company

191160

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Golden Nugget, Incorporated, has no parent corporation and no publicly held company owns 10% or more of its stock.

The parent company of Respondent Indian Harbor Insurance Company is XL America. XL Capital of Bermuda is the only publicly traded company which owns 10% or more of the stock of Indian Harbor Insurance Company.

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INTRODUCTION

Plaintiffs/Respondents Golden Nugget, Incorporated, Indian Harbor Insurance Company (collectively "GNI"), and David Hickman ("Hickman"), submit this Brief in response to the Petition for a Writ of Certiorari filed by the Defendant/ Petitioner, Chesapeake Bay Fishing Company, L.C. ("Chesapeake Bay").

Chesapeake Bay asserts that the Court should review the decision in this matter because the United States Court of Appeals for the Fourth Circuit Court has created a new standard for the disclosure of expert testimony under Rule 26(a)(2)(B), one that requires the disclosure of only the "subject area or issue" or "general topic area" of expert testimony.

Chesapeake Bay's creative spin on the decision issued by the Fourth Circuit, in an unpublished opinion limited to the facts of this case, is unsupported, misstates the actual opinion of the court and relies on the omission of relevant portions of the record. Far from announcing a new "rule", the Fourth Circuit, reviewed the decision of the United States District Court for the Eastern District of Virginia and properly determined that the District Court did not abuse its discretion by admitting expert testimony offered by GNI.

STATEMENT OF THE CASE

At issue in this case is the cause of a fire that occurred on board the F/V GOLDEN NUGGET while the vessel was at Ampro Shipyard, owned by Chesapeake Bay, for repairs. GNI does not dispute the general background facts recited in the Petition for Writ of Certiorari ("Petition").

As Chesapeake Bay notes, the parties agreed that source of the fire was a small fan. The issue in the case addressed, in part, by expert testimony was whether excessive voltage or excessive current caused the fan to overheat or spark, thereby causing the fire.

A. Expert Disclosures

On September 21, 2001, before the Complaint was filed, counsel for GNI sent a letter to counsel for Chesapeake Bay outlining the Plaintiffs' theory of causation. Joint Appendix filed in the Fourth Circuit (hereinafter "Fourth Cir. App.") 544-45. In the letter, counsel for GNI indicated that voltage spiking occurred on the *morning of October 20, 2003*, shortly after the vessel arrived at Ampro. "This spiking was severe enough to cause a light bulb on the vessel to explode." The letter advised Chesapeake Bay that GNI believed that the fire had been caused by voltage spiking that occurred as a result of the shipyard's initial attempts to hook up shore power, as well as by the welding that took place on October 25, 2000.

On October 25, 2002, GNI and Hickman produced the Expert Report of Fred West ("West"). West's Expert Report was comprised of his Investigative Report dated October 10, 2000 and a letter dated October 28, 2001[1] addressing and rebutting various conclusions reached by Chesapeake Bay's expert, William C. Harris, P.E. ("Harris"). Fourth Cir. App. 646-81. Although West's Expert Report opined that voltage spikes caused by the welding led to the fire, it also specifically discussed the breakdown or "internal explosion" of

1. The letter is conveniently omitted from the Appendix compiled by Chesapeake Bay.

equipment caused by excess voltage. App. 36. Moreover, in response to a letter written by Harris to counsel for Chesapeake Bay, West stated specifically that he disagreed with Harris' opinion that the problems with the *initial shore power hookup* "had the potential to cause equipment damage and personal injury or death, but I do not believe it to be the cause of the fire." Fourth Cir. App. (emphasis added) ("I disagree with his findings and feel it is possible cause of damage.") In addition, West disagreed with Harris' statement that the *initial hookup* "should not have any effect on equipment downstream of fault." *Id.* Thus, West's Expert Report (which contained his response to Harris' October 3, 2001 letter) indicated his opinion that voltage spiking connected with the shipyard's failed attempt to hook up shore power to the vessel could have damaged the fan and that later voltage spiking related to the welding caused the damaged fan to spark and ignite the fire.

By mutual agreement, the parties deposed both West and Harris on December 23, 2003. Harris attended West's deposition. As revealed by the deposition transcripts of both West and Harris, counsel for both parties thoroughly questioned both Harris and West about West's opinion that *problems with the initial shore power hookup* caused voltage spiking that damaged the fan and that later sparking, caused by the welding, led directly to the fire.

B. Trial Testimony

During the trial, the issue of the scope of West's Expert Report was raised by counsel for Chesapeake Bay in the form of objections to opinions offered by West during his testimony. The District Court correctly ruled that West's

opinions were consistent with the opinions disclosed in his Expert Report.

Chesapeake Bay's claim that it "was not prepared to address this critical question – and had not tested the proposition – because the opinion had not been disclosed in West's expert report," (Petition, at 10), is disingenuous. In fact, the record demonstrates that (1) West's opinion was disclosed to Chesapeake Bay well in advance of the trial, (2) Harris, Chesapeake Bay's expert, knew about and understood the theory at least by the time of West's deposition, if not before, and (3) counsel for Chesapeake Bay thoroughly explored the theory in West's deposition. Chesapeake Bay was fully prepared for trial and, in fact, presented evidence to rebut West's opinion testimony during the trial. Fourth Cir. App. 314-15.

The jury found Chesapeake Bay liable for negligence, breach of an implied warranty of workmanlike performance and breach of a bailment contract. The District Court entered final judgment against Chesapeake Bay in the amount of $425,558. Chesapeake Bay timely filed a Notice of Appeal to the Fourth Circuit.

C. Decision of the Fourth Circuit

On appeal, Chesapeake Bay asserted that the District Court erred in permitting West to testify that excessive voltage, at the time of the initial hookup, caused the fire. Chesapeake Bay contended that West had not disclosed, in his Expert Report, his opinion that voltage spiking at the time of the initial shore power hookup was a cause of the fire. In an unpublished decision, a Panel of the Fourth Circuit held that the District Court did not abuse its discretion in

allowing West's testimony that excessive voltage was the cause of the fire. App. 1-13 Contrary to Chesapeake Bay's assertions, the Panel did not create a new rule for expert disclosures under Rule 26(a)(2)(B). It merely determined that, based on the facts of this particular case, the District Court did not abuse its discretion in admitting West's expert testimony on this point.

The Fourth Circuit subsequently denied Chesapeake Bay's Petition for Rehearing *En Banc* on July 28, 2004. App. 22-23. Having (1) lost in the trial court, (2) failed to convince the District Court to enter judgment as a matter of law, (3) lost on appeal to a Panel of the Fourth Circuit, and (4) had its Petition for Rehearing *En Banc* denied, Chesapeake Bay now seeks review by this Court of a fact specific decision rendered in an unpublished opinion. The Court should see the Petition for what it is – an attempt to create an issue out of whole cloth in order to have yet another Court re-examine the facts of the case, apply the same legal standards that have been applied at every previous stage of these proceedings, and reach a different factual conclusion. Such an undertaking is not the purpose of a Petition for Writ of Certiorari and, accordingly, the Court should deny Chesapeake Bay's Petition.

REASONS FOR DENYING THE PETITION

The Fourth Circuit's Opinion Does Not Announce a New Rule of Law Concerning Disclosure of Expert Testimony Under Federal Rule of Civil Procedure 26(a)(2)(B)

Chesapeake Bay mischaracterizes the unpublished Panel Opinion in its effort to create an issue for review by this Court. The Fourth Circuit did not hold that West's disclosure was "at best unclear." Petition, at 13. Instead, the Panel dissected West's Expert Report and reached the factual conclusion that "while GNI's theory of causation could have been articulated more definitively, it was generally disclosed in West's Expert Report."[2] App. 13. Chesapeake Bay overstates the significance of the unpublished Panel decision and fails to recognize that the Fourth Circuit's opinion is heavily grounded in the particular facts of this case. It manifestly does not announce a new standard or rule governing the interpretation of Rule 26(a)(2)(B).

The Fourth Circuit's opinion simply does not reflect a holding that "identification of a general topic area of expert testimony" is sufficient under Rule 26(a)(2). Rather, it represents an endorsement of the District Court's factual determination that West's Expert Report adequately disclosed his opinion, and the theory behind it, and that testimony concerning that theory was properly admitted at trial. As

---

2. Inherent in the Panel Opinion is the finding that Chesapeake Bay had sufficient notice of West's theory to adequately prepare for it and counter it at trial, thereby rendering any failure to disclose harmless. App. 13 (noting that the trial court did not abuse its discretion in allowing the testimony at trial).

Chesapeake Bay observes, Rule 26(a)(2)(B) sets forth the standard for initial expert disclosures. Whether a particular expert report meets the requirements of that rule necessarily is a question of fact.

Moreover, it is a question entrusted to the broad discretion of the trial court. *See Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995) (the imposition of sanctions for discovery abuse is within the discretion of the trial court and is reviewed for abuse of discretion); *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 (4th Cir. 2003) (noting that courts give particularly wide latitude to the district court's discretion to issue sanctions). The Fourth Circuit properly analyzed the District Court's ruling to ensure that its findings were not clearly erroneous. *Hester v. CSX Transp., Inc.*, 61 F.3d 382, 388 (5th Cir. 1995) (noting that the admission of expert testimony is a matter committed to the district court's discretion, reversible only for manifest error). During the course of the trial, the District Court held that the opinions expressed by West in his testimony were disclosed in his Expert Report. The Fourth Circuit reviewed these holdings for clear error. It did not and could not review them under a *de novo* standard and neither should this Court.

Contrary to Chesapeake Bay's assertions, the Fourth Circuit's "interpretation of Rule 26(a)(2)(B) does not conflict with the interpretation of the rule adopted by other circuits. Instead, the cases cited by Chesapeake Bay arose in a distinguishable procedural posture. In each of the cases cited by Chesapeake Bay, the courts applied an abuse of discretion standard to uphold rulings by the trial courts excluding expert testimony. *Sierra Club, Lone Star Chapter v. Cedar Point Oil, Co.*, 73 F.3d 546, 569 (5th Cir. 1996) (affirming district court's decision to exclude testimony of experts at trial);

Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277, 284 (8th Cir. 1995) (affirming trial court's ruling excluding expert testimony on basis that qualifications were not shown in affidavit); *Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998) (affirming district court's decision to exclude expert testimony when party failed to timely produce expert report). In this case, the Fourth Circuit was called on to review, for clear error, the District Court's ruling admitting expert testimony. The same deference accorded to district courts excluding evidence is accorded to those admitting it. *Hester*, 61 F.3d at 388 (admission of expert testimony reversible only for manifest error).

Moreover, each case was decided on its specific facts. The cases do not state a rule of interpretation independent from their unique factual circumstances. Similarly, in this case the Fourth Circuit reviewed the decision of the District Court to admit expert testimony based solely on the facts of this particular case. It did not announce a "topic area standard" that conflicts with "standards" announced by other circuit courts. Moreover, the Fourth Circuit's fact-specific ruling in this case is contained in an unpublished opinion with no precedential value. Contrary to Chesapeake Bay's assertions, the Panel decision has little significance beyond the present case. It simply will not open the door to a heretofore prohibited flood of substantively deficient expert reports. A consistently disappointed litigant that has lost at every level of these proceedings, Chesapeake Bay is determined to try its luck one last time. To that end, it seeks to manufacture an attractive appellate issue where only a routine question of trial court discretion exists. At the end of the day, Chesapeake Bay simply disagrees with the factual findings of the District Court, which were reviewed and

affirmed by the Fourth Circuit. Such disagreement does not offer a legitimate basis to support a grant of *certiorari* by the Court.

CONCLUSION

For the reasons set forth above, Plaintiffs/Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FRANK L. CORRADO, JR.
STEPHEN BARRY
ROSSI, BARRY, CORRADO,
GRASSI & GIBSON, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333

Attorneys for Respondents Golden Nugget, Incorporated and David Hickman

SAMUEL W. HIXON, III
Counsel of Record
MEGAN E. BURNS
WILLIAMS MULLEN
A Professional Corporation
222 Central Park Avenue
Suite 1700
Virginia Beach, VA 23462
(757) 499-8800

CHRISTOPHER A. ABEL
TROUTMAN SANDERS, LLP
150 West Main Street
Suite 1600
Norfolk, VA 23510
(757) 640-0004

Attorneys for Respondent Indian Harbor Insurance Company